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No. 77-6949

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

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MEMORANDUM FOR THE UNITED STATES

QUESTION PRESENTED

Whether a witness who has testified before a grand jury under a grant of immunity and subsequently gives contradictory non-immunized testimony in a judicial proceeding may have his immunized testimony used against him in a false declarations prosecution based on the inconsistent statements theory of 18 U.S.C. 1623(c).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on three counts of making false declarations, in violation of 18 U.S.C. 1623. 1/ He was sentenced to concurrent five-year terms of imprisonment. The court of appeals affirmed (Pet. App. 1-12).

1/ Petitioner was acquitted on two other counts.

1. The evidence adduced at trial shows that on June 16, 1976, petitioner testified under a grant of immunity (see 18 U.S.C. 6002) before a federal grand jury investigating illegal drug activity at the Colorado State Penitentiary. Petitioner testified that Phillip Musgrave gave him drugs in the penitentiary (I R. 99-100),[2] that petitioner made telephone calls at the behest of Musgrave to a Kate Blehm during which code words for drugs were used (I R. 117-118), and that in February 1976 Musgrave gave him a list of chemicals that he wanted (I R. 150). Following this testimony, the grand jury indicted Musgrave on charges of conspiring to manufacture and distribute controlled substances.

Approximately three months later, on September 30, 1976, petitioner went to the office of Michael Canges, Musgrave's attorney, and gave a statement under oath recanting his grand jury testimony implicating Musgrave (I R. 74, 77-79). Musgrave's attorney filed a transcript of petitioner's statement in the district court where Musgrave's prosecution was pending and moved to dismiss the indictment because it was based upon petitioner's allegedly perjured testimony.

Thereafter, at an evidentiary hearing in the district court on Musgrave's motion, petitioner adopted the statement he had given at Canges' office and testified that "[p]ossibly ten percent" of his grand jury testimony was truthful (Pet. 9).[3] This testimony was volunteered by petitioner, who had received no grant of immunity with respect thereto.

2/ "R." refers to the record in the court of appeals.

3/ As a result of petitioner's sworn deposition and his testimony at the evidentiary hearing, the government negotiated a plea with Musgrave wherein he pleaded guilty to possession of methamphetamine in violation of 21 U.S.C. 844, a misdemeanor (Tr. 76-77).

Petitioner was then indicted for knowingly making a false material declaration in violation of 18 U.S.C. 1623. The indictment charged, under the theory of prosecution authorized by subsection (c) of Section 1623, that various statements made during petitioner's grand jury testimony were inconsistent with statements made under oath to Musgrave's attorney and adopted at the subsequent court hearing "to the degree that one of them is necessarily false * * *." At trial, the government introduced the relevant portions of petitioner's grand jury testimony, his sworn statement to Musgrave's attorney, and his testimony at the evidentiary hearing. (Pet. App. 2-3).

2. On appeal, petitioner contended that the sworn recantation given in the attorney's office could not form the basis for a false declaration prosecution under 18 U.S.C. 1623 and that, in any event, the prosecution could not use petitioner's immunized grand jury testimony in a prosecution under Section 1623 based upon an inconsistent statements theory.

As to the first contention, the court of appeals agreed with petitioner that the taking of the sworn recantation in attorney Canges' office did not constitute a "proceeding before or ancillary to any court or grand jury" within the meaning of Section 1623 (Pet. App. 5-6). Nevertheless, the court held that the evidence of petitioner's subsequent affirmation of the recantation during the hearing on Musgrave's motion to dismiss could sustain the prosecution under Section 1623. While the indictment referred to the Canges statement rather than the subsequent in-court testimony, the court of appeals concluded that this variance

between the indictment and the proof at trial was not fatal because petitioner could have anticipated that the evidence of his testimony would be presented against him at trial (Pet. App. 7-8).[4/]

Turning to the question whether petitioner's immunized grand jury testimony was properly used against him at trial, the court of appeals held that, while truthful testimony given under immunity cannot be used to incriminate the witness for crimes concerning which he testifies, perjured testimony is not protected by the immunity and may be used to establish perjury or false declarations (Pet. App. 8-9; see United States v. Mandujano, 425 U.S. 564 (1976)). The court also accepted the "general proposition that immunized testimony may not be used to establish the corpus delicti of an inconsistent declarations prosecution without a prior showing of falsity" (Pet. App. 10). The court found, however, that petitioner's "subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only [was] inconsistent with his immunized grand jury testimony, but, significantly, contained [petitioner's] admission that he had in fact testified falsely before the grand jury" (Pet. App. 11; emphasis in original).

The court concluded that petitioner's "unequivocal admission that his immunized testimony before the grand jury was false

4/ The second question presented by the petition (Pet. 2) involves the issue whether the Canges statement could properly form the basis of a prosecution under Section 1623. Since this issue was resolved in petitioner's favor by the court of appeals, there is no occasion for this Court to review it. Petitioner does not otherwise attack the validity of the indictment, and the court of appeals' decision sustaining the indictment presents no issue of sufficient importance to require consideration by this Court.

justified the use of such immunized testimony to establish the corpus delicti of the present prosecution." Ibid. The court reasoned that petitioner had "grossly abused" the grant of immunity (ibid.) and that his recantation "in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury" (Pet. App. 12, citing Shotwell Manufacturing Co. v. United States, 371 U.S. 341, 349-350 (1963)).

DISCUSSION

In this case petitioner gave immunized testimony before the grand jury and subsequently gave inconsistent non-immunized testimony during the Musgrave hearing. He was thereafter indicted for making false material declarations, and the prosecution was maintained under the inconsistent statements rationale of 18 U.S.C. 1623(c). The question presented, as we view it, is whether either the Fifth Amendment privilege against compelled self-incrimination or the provisions of the use immunity statute, 18 U.S.C. 6002, bar the use of the inconsistent statements theory in this prosecution, on the ground that petitioner is protected from the use of truthful immunized testimony against him to prove the falsity of subsequent non-immunized testimony.

While we believe that the court of appeals reached the correct result in this case, we recognize that the issue presented is significant and that there are strong indications that three circuits would have reached a contrary result. Accordingly, we would ordinarily acquiesce in the grant of certiorari in this case.

However, because this Court has granted review in another case (New Jersey v. Portash, No. 77-1489, cert. granted June 12, 1978), the decision in which may be dispositive of the constitutional issue presented herein, we are recommending that this case be held pending further developments.

1. It is not disputed that petitioner testified under oath on two occasions so inconsistently that it may be concluded with assurance that he testified falsely on one or the other of those occasions. The issue here concerns the manner in which the prosecution may prove the offense that undoubtedly occurred. By utilizing the inconsistent statements approach permitted by Section 1623(c), the prosecution eschewed the burden of proving specifically that one or the other of the inconsistent statements was false. If the approach was validly employed here, the convictions could stand either on the theory that petitioner's grand jury testimony was false and his subsequent recantation of that testimony truthful, or on the theory that the grand jury testimony was truthful and the contradictory testimony at the Musgrave hearing false.

Preliminarily, we note that we do not agree with the rationale employed by the court of appeals to sustain use of the inconsistent statements theory in this case. Proceeding from the sound predicate that the immunity granted petitioner to override his claim of privilege protects only truthful testimony (see, e.g., United States v. Mandujano, 425 U.S. 564 (1976); United States v. Knox, 396 U.S. 77, 81-82 (1969)), the court considered petitioner's subsequent avowal that the grand jury testimony was false to be sufficient to deprive it of immunity from use by the prosecution (Pet. App. 11). We believe this approach would ordinarily be

appropriate in cases in which the prosecution seeks to use the immunized testimony only for its falsity. See United States v. Moss, 562 F. 2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); cf. United States v. Kahan, 415 U.S. 239 (1974); United States v. Tramunti, 500 F. 2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Here, however, the prosecution did not necessarily rest on the theory that petitioner's immunized grand jury testimony was false; it was equally likely that the conviction was based on the truthfulness of the grand jury testimony and the falsity of petitioner's subsequent sworn but non-immunized recantation. In view of the latter possibility, petitioner's statement that his grand jury testimony had been false does not in our view suffice to establish the proposition that it could be used against him even if truthful, a proposition that is essential to sustaining the validity of his conviction.

Although we disclaim reliance upon the rationale of the court of appeals, we nevertheless submit that it reached the correct result. Thus, while truthful immunized testimony may not be used in any way to prove any offense that the witness had committed at the time he invoked the privilege against compelled self-incrimination and was required to testify, the protection does not necessarily extend to use of the testimony to prove a subsequent offense, particularly the subsequent offense of perjury. As the Court observed in United States v. Freed, 401 U.S. 601, 606-607 (1971), there exists no "periphery of the Self-Incrimination Clause which protects a person against incrimination not only against

past or present transgressions but which supplies insulation for a career of crime about to be launched." See also id. at 610-612 (Brennan, J., concurring); United States v. Bryan, 339 U.S. 323, 340-341 (1950); Glickstein v. United States, 222 U.S. 139, 142 (1911). 5/

We submit that the extent of the constitutional immunity conferred upon a witness who is compelled to testify is properly measured by the scope of the privilege enjoyed by the witness at the time he declines to testify on Fifth Amendment grounds. Thus, in the instant case, petitioner was privileged to decline to testify with regard to drug dealings at the prison, as to which he appears to have had some potential culpability. The grant of immunity under which his grand jury testimony was compelled precludes use of his testimony or its fruits to convict him of the substantive offenses about which he testified, and the government has made no attempt to utilize his immunized testimony for such a purpose.

On the other hand, had petitioner invoked his privilege solely on the ground that he might in some subsequent proceeding elect to give materially inconsistent testimony, and he did not wish to create evidence now that could be employed to establish the falsity of such hypothetical future testimony, we see little basis for serious argument that such a claim of privilege would be sustainable.

5/ Marchetti v. United States, 390 U.S. 39, 53-54 (1968), rejects an absolute past-future distinction for purposes of evaluating the scope of the privilege that may legitimately be claimed under the Fifth Amendment. How Marchetti's conclusion is to be squared with Freed is uncertain, but in any event we do not read Marchetti as holding that any possibility of incrimination respecting future offenses will support invocation of the privilege. At most, it suggests that the general principle of distinguishing between past and future offenses may be subject to a fairly narrow exception in cases in which the potential for incrimination is substantial, non-speculative, and relatively immediate.

Since the privilege could not properly have been invoked on this basis, we believe that the constitutional immunity acquired when petitioner was compelled to testify did not embrace this possible incriminating use of his testimony. 6/ If we are correct, it follows that there is no constitutional barrier to the use in this case of petitioner's immunized grand jury testimony, even if that testimony was truthful, to establish the falsity of his subsequent inconsistent testimony at the Musgrave hearing. 7/

The soundness of this proposition is illustrated by considering what the effect would have been of a grant of transactional immunity to petitioner at the time of his grand jury testimony. Such immunity, which we assume would have sufficed to satisfy his rights under the Fifth Amendment privilege, would presumably not have protected him from prosecution for a subsequent perjury in testifying about the substantive offenses for which he has been immunized. If that is correct, then there seems little basis for concluding that the use of immunity granted in this case conferred constitutional protection against use of petitioner's testimony to establish a subsequent perjury.

6/ We acknowledge that this analysis may be inconsistent with the approach taken by the Court in Cameron v. United States, 231 U.S. 710, 721 (1914), in considering a repealed provision of the Bankruptcy Act of 1898. We believe that the statutory ruling in Cameron should not be deemed controlling of the constitutional question presented here, especially in light of its tension with later decisions of this Court on the scope of the privilege against compelled self-incrimination.

7/ Even if there is no constitutional obstacle to the use of immunized testimony to prove a crime committed subsequent to the giving of the testimony, the language of the last clause of 18 U.S.C. 6002 could be read to preclude such use. At least one court, however, has concluded that the language should not be read literally to bar all uses other than those specified by the statute. United States v. Tramunti, supra, 500 F. 2d at 1345; see also Korman, The Use of Testimony Compelled Under a Grant of Use Immunity, 44 Brooklyn L. Rev. 935, 936 (1978). While this statutory issue presumably will require consideration in the event review of the decision in this case is granted, we do not believe that the statutory question independently warrants review if the constitutional issue is resolved in Portash.

2. The view we advance here -- that even truthful immunized testimony is not necessarily entirely immune from use in any criminal prosecution of the witness -- is contrary to strongly worded dicta in several court of appeals opinions that indicate that the courts in question would not have upheld petitioner's convictions. This divergence of views and of probable results further supports review of the instant case by this Court, unless the issue is disposed of in the interim by the decision in New Jersey v. Portash (see point 3, infra).

In United States v. Berardelli, 565 F. 2d 24 (2d Cir. 1977), and United States v. Patrick, 542 F. 2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), the courts were presented with appeals by witnesses who had been held in contempt for refusing, despite a grant of immunity, to give testimony on the ground that their testimony, if inconsistent with prior testimony they had given, might be used to convict them of making false declarations under the inconsistent statements theory of Section 1623(c). In United States v. Housand, 550 F. 2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified under a grant of immunity before the grand jury refused, in the absence of a new grant of immunity, to testify at trial; this refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal. The contempt convictions of Patrick and Berardelli were affirmed, while the claim of the appellant in Housand was rejected. Each opinion explicitly, albeit unnecessarily, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later perjury. See also United States v. Apfelbaum, No. 77-2427 (3d Cir. August 10, 1978).

The results in Berardelli, Housand, and Patrick were plainly correct wholly without regard to their dicta and are not inconsistent with the result in the instant case. In each of those cases the witness, having previously testified, was called to testify on the same subject a second time. In each case he invoked his privilege on the ground that truthful testimony on the second occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded use of the testimony at the second appearance to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was absolutely no necessity for the courts to express any view about the use that might be made of any immunized testimony, truthful or otherwise, given during an earlier appearance.

In the instant case, by contrast, petitioner's second, inconsistent testimony, was volunteered by him. He could have invoked his privilege to refuse to give that testimony without a grant of immunity, but he did not do so. Accordingly, there was here no potential for use of compelled, immunized testimony against petitioner to incriminate him with respect to prior unlawful conduct. Nevertheless, while this case is distinguishable, we believe that the unqualified nature of the dicta in cases from three other circuits is sufficient to justify consideration of the validity of petitioner's conviction by this Court.

3. We do not suggest an immediate grant of certiorari in this case, however, because the constitutional issue it presents may be effectively resolved by this Court's decision in New Jersey v. Portash, supra, in which review has already been granted and

which is set for argument within the next few weeks. In Portash the defendant gave grand jury testimony under a grant of use immunity and was thereafter indicted for offenses that had been the subject of his testimony. The trial court ruled that, should Portash elect to testify and should his testimony be inconsistent with his immunized grand jury testimony, the prosecution would be permitted to use his grand jury testimony to impeach his trial testimony. Since the premise of such impeachment use would necessarily be that the immunized grand jury testimony was truthful and demonstrated the falsity of his subsequent inconsistent testimony, the case is analytically parallel to the instant case, where the crucial issue is the propriety of using petitioner's immunized grand jury testimony against him on the hypothesis that it was truthful and that it showed the falsity of his later testimony.

Accordingly, if the State prevails in Portash, the correctness of the affirmance of petitioner's conviction would be demonstrated, and there would be no need for this Court to grant review of that conviction. If the State's position is rejected by this Court, however, it would not necessarily follow that petitioner's conviction is infirm. There is a material difference in the cases in this regard: in Portash, the immunized testimony would be employed to help the State establish the defendant's guilt of the same crime regarding which his claim of privilege was overridden by the immunity grant; in the instant case, by contrast, it is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege. Consequently, we think it likely that review of this case would be in order if the decision in Portash is affirmed.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in New Jersey v. Portash. If Portash is reversed, certiorari should be denied in this case. If Portash is affirmed, certiorari should be granted in this case.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

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